United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

JOINT APPENDIX

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,394

219

CHARLES O. PORTER,

Appellant,

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
For the
District of Columbia Circuit

FILED JAN 25 1960

Joseph W. Stewart

CLERK

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[48] Filed August 27, 1959. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2372-59

CHARLES O. PORTER, HOUSE OF REPRESENTATIVES, U. S. CONGRESS, *Plaintiff*,

v.

CHRISTIAN A. HERTER, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES, *Defendant*

COMPLAINT FOR INJUNCTION AND DECLARATORY JUDGMENT

1. This is a civil action for equitable relief and for declaratory judgment arising under the Constitution and laws of the United States. The amount in controversy exceeds $10,000, exclusive of interest and costs.

2. This Court has jurisdiction of this action under D. C. Code, Sections 11-305 and 11-306; under Section 10 of the Administrative Procedure Act, Title 5 U. S. Code, Section 1009; and under Title 28 U. S. Code, Sections 1331, 1332, 2201, 2202 and 1343.

3. Plaintiff is a citizen of the United States and of the State of Oregon.

4. Defendant is Secretary of State of the United States of America. His official residence is in the District of Columbia. He is charged by law with the duty of issuing passports to United States citizens, but has asserted and now asserts the power to withhold passports or limit their use and thereby restrict the travel opportunities of citizens.

5. The defendant will not validate passports for travel to countries, such as China, with which we do not have diplomatic relations. At the present time, the following inscription is printed in every United States passport, including the one issued on August 7, 1958, to plaintiff: "This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria, and those portions of China, Korea and Viet Nam under Communist control."

6. The Department headed by the defendant has publicly announced and formally ruled that travel to China would be a violation of the terms and conditions of the passport, would result in the revocation of the passport and the denial of passport facilities in the future, and that travel to China might cause the institution of a criminal prosecution. [49] 7. The Department of State has seized, declared invalid, and refused to renew the passports of citizens who traveled to China with passports containing the aforesaid restrictions.

8. The Department of State has made exceptions to the above mentioned policy and has authorized or agreed to authorize 27 American news correspondents to visit China. A letter to plaintiff dated August 18, 1959, contains the names and addresses of such persons, and is attached hereto as Exhibit A and made a part hereof.

9. Plaintiff is, and at all times pertinent to this complaint has been, a member of the United States Congress representing the Fourth Congressional District in the State of Oregon.

10. Plaintiff is, by virtue of his office, charged with the duty of formulating and voting on legislation concerning the domestic and foreign relations of the United States.

11. Plaintiff has concerned himself with the important shipping, commercial and trade interests of the state he represents and the relationship of these interests to the nation's foreign policies.

12. Plaintiff has, in pursuance of his duties as a member of Congress, conducted investigations by personal visits into the relations of the United States with the Dominican Republic, and with the Republic of Cuba, and with other nations.

13. Plaintiff, at the end of the current Congressional session, intends to leave for the Orient on Congressional business. His itinerary now contemplates stops at Japan, the Philippine Islands, Formosa, and Hong Kong.

14. Plaintiff, on this forthcoming trip, desires to visit China to learn about the conditions and potentialities of trade and other facts relating to United States policies and legislation.

15. The Congress of the United States, of which plaintiff

is a member, has, since 1790, enacted 28 bills relating to passports. Some of these bills, such as the Act of April 30, 1878 (20 Stat. 40), expressly direct the Secretary of State to issue passports to persons desiring to go to designated foreign countries.

16. On July 7, 1958, the President of the United States sent a message to Congress requesting legislation to enable the Secretary of State to refuse passports, among other things, "for travel to areas where there is no means of [50] protecting them [American citizens] or where their presence would conflict with our foreign-policy objectives or be inimical to the security of the United States."

17. On July 7, 1958, the Secretary of State transmitted a proposed bill to the Speaker of the House which, among other things, would authorize the Secretary of State to refuse passports for travel in designated countries or areas. This legislation is currently pending before the Congress of the United States.

18. On October 16, 1958, plaintiff was informed by letter from William B. Macomber, Jr., that members of Congress are given the same legal considerations as any other American citizen regarding the prohibition against travel to Communist China. Plaintiff was further informed by this letter that "The policy with regard to travel by Americans to Communist China remains unchanged, although it is naturally subject to periodic review. Those few exceptions which have been made in the past were dictated by compelling considerations of national and humanitarian interests, such as the visit made by their respective mothers to two Americans imprisoned in Red China."

19. By letter dated December 12, 1958, plaintiff was informed by William B. Macomber, Jr., Assistant Secretary of State, that "If a member of Congress were to apply for a passport valid for travel to Communist China, his application would receive the Department's fullest consideration in the light of the Government's general policy and any exceptions which may be made thereto."

20. On June 10, 1959, plaintiff wrote the defendant Secretary of State "applying for permission to visit Red China." Plaintiff pointed out in this letter that "A member of Congress has a right to go anywhere in the world to

do his duty as a U. S. legislator as he sees it, except in time of war or emergency. Any other policy would seem to be an unconstitutional breach of the separation of powers."

21. By letter of July 2, 1959, William B. Macomber, Jr., Assistant Secretary, writing for the Secretary of State, denied plaintiff's application. A copy of this letter is attached hereto as Exhibit B and made a part hereof.

22. By telegram of August 19, 1959, plaintiff asked defendant "whether there are any further administrative remedies open to me."

23. By letter of August 25, 1959, plaintiff was informed by William B. Macomber, Jr., Assistant Secretary, writing for the Secretary of State, that: [51] "Actions denying validation of passports for Communist China are based upon foreign policy considerations and consequently raise no issues for determination by administrative procedures. In view of the foregoing, and the provisions of Section 51.143 of the Passport Regulations (22 C.F.R.) you are considered to have exhausted your available administrative remedies."

24. Plaintiff has exhausted his administrative remedies.

25. The action of the defendant in this case is unlawful in that:

(a) Plaintiff, as a member of the United States Congress, has a right, duty, and obligation to obtain information relating to pending legislation, by personal visit or otherwise. Defendant's denial of plaintiff's right to visit China is a violation of the separation of powers doctrine and impinges upon plaintiff's constitutional rights as a member of Congress.

(b) The statutes authorizing the Secretary of State to issue passports do not authorize him to prevent the travel of a United States citizen, particularly a member of the United States Congress, to China.

(c) Plaintiff as an American citizen has a right under the First, Fifth and Ninth Amendments to travel to China.

(d) The denial of the right to travel to plaintiff, while authorizing others to travel in China, is unreasonable, arbitrary, ad discriminatory and in violation of

plaintiff's rights under the due process clause of the Fifth Amendment.

26. The damage done to plaintiff by the unlawful acts of defendant is irreparable, the full extent thereof cannot be measured in monetary terms, and is continuing, so that plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that this Court

(a) Adjudge and declare that defendant's refusal to afford passport facilities to plaintiff so that he may go to China is in violation of plaintiff's rights under the Passport Act of 1926 and the Constitution of the United States;

(b) Issue an injunction preventing the defendant from withholding from plaintiff passport facilities so that he may go to China and enjoining the defendant from taking any adverse action whatsoever by way of passport cancellation, denial of future passport facilities, the institution of criminal proceedings or otherwise against the plaintiff by reason of travel to China;

[52] (c) Issue an injunction compelling defendant to remove from plaintiff's passport the limitation upon its use for travel to China.

(d) Issue a preliminary injunction, pending the disposition of this action, enjoining the defendant from continuing to deny passport facilities to plaintiff necessary for his travel to China.

(e) Grant such other and further relief as to the Court may seem just and proper.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
DANIEL H. POLLITT,
JOHN SILARD,
Attorneys for Plaintiff,
1631 K Street, N. W.
Washington 6, D. C.

AUGUST 27, 1959.

[53] Filed August 27, 1959. Harry M. Hull, Clerk

EXHIBIT A

DEPARTMENT OF STATE

Washington

August 18, 1959.

DEAR MR. PORTER:

Pursuant to your verbal request of August 3, 1959, there is listed below the name and address of each person whose passport is now validated for travel to Communist China.

News Correspondents:

William Keyes Beech
Tokyo Correspondents Club
No. 1 Shimbun Alley
Marunouchi, Tokyo, Japan
Chicago News, Chicago, Illinois

William Benton
Sasco Hill Road
Southport, Connecticut
Encyclopedia Britannica, New York, New York

Demaree C. Bess
Kimberly Knoll
Asheville, North Carolina
Saturday Evening Post, Philadelphia, Pennsylvania

Russell D. Brines
95 East Emerson Street
Chula Vista, California
Copley News Service, San Diego, California

Forrest C. Edwards
Al Estoril Court
15 Garden Road
Hong Kong
Associated Press, New York, New York

Yancey Sherard Gilkerson, Jr.
112 Lanneau Drive
Greenville, South Carolina
Fairchild Publications, New York, New York

George Howard Grim
4825 East Lake Harriet Boulevard
Minneapolis 9, Minnesota
Minneapolis Star and Tribune, Minneapolis, Minnesota

William K. Hosokawa
3060 Cherry Street
Denver 7, Colorado
The Denver Post, Denver, Colorado

Chesly Leon Manly
3300 Lake Shore Drive
Chicago, Iillinois
The Chicago Tribune, Chicago, Illinois

Robert W. Martin
116 4-Chome Fukayawa-Machi
Setagaya-Isu, Tokyo, Japan
United States News and World Report, Washington, D. C.

[54] Igor M. Oganesoff
Gloucester Hotel, Room 402
Hong Kong
The Wall Street Journal, New York, New York

Oland Dale Russell
2251 North Quincy Street
Arlington 7, Virginia
Scripps-Howard Newspapers, Washington, D. C.

Guy Warren Searls
517 Jaffee Road, Top Floor
Hong Kong
Columbia Broadcasting System, Washington, D. C.

James Vincent Sheean
South Pomfret, Vermont
Westinghouse Broadcasting Company, Washington, D. C.

Archibald T. Steele
1002 Franklin Street
Boise, Idaho
New York Herald Tribune, New York, New York

The following news correspondents have been designated by the particular news agency indicated and upon request their passports will be validated for travel to Communist China.

James C. Burke
349 Sound Beach Avenue
Old Greenwich, Connecticut
Time Incorporated, New York, New York

Marquis William Childs
3554 Edmunds Street, N. W.
Washington, D. C.
St. Louis Post-Dispatch, Washington, D. C.

F. Tillman Durdin
Gloucester Hotel
Hong Kong
New York Times, New York, New York

Robert S. Elegant
139 Sundarnagar
New Delhi, India
Newsweek, New York, New York

Raymond Fritz Falk
24 Otsuka Kubo-Machi
Bunkyo Ku, Tokyo, Japan
American Broadcasting Company, New York, New York

Julian Bryan
1 East 42nd Street
New York, New York
North American Newspaper Alliance, New York, New York

Fulton Lewis, Jr.
2800 Upton Street, N. W.
Washington, D. C.
Mutual Broadcasting System, Washington, D. C.

Wendell S. Merick
41A Conduit Road
Hong Kong
United Press International, New York, New York

[55] James Albert Michener
Tinicum, Pennsylvania
The Reader's Digest, Pleasantville, New York

John Philip Potter
Imperial Hotel
Tokyo, Japan
Baltimore Sun, Baltimore, Maryland

James G. Robinson
c/o Foreign Correspondence Club
Chiyoda-Ku, Tokyo, Japan
National Broadcasting Company, New York, New York

Sol Witner Sanders
No. 14 Hiroo-cho, Minato Ku, Azabu
Tokyo, Japan
McGraw Hill, New York, New York

If I can be of any further service please call upon me.

Sincerely yours,

WILLIAM B. MACOMBER, JR.,
Assistant Secretary.

[56]

EXHIBIT B

DEPARTMENT OF STATE

Washington

July 2, 1959.

DEAR MR. PORTER:

I refer to your letter of June 10, 1959 requesting permission to visit Communist China shortly after the adjournment of the present session of Congress. You indicate your desire to be accompanied by a number of persons and that the purpose of your visit is to learn about conditions and trade potentialities and other facts relating to policy and legislative aspects.

In 1952 the Department established the policy of not validating passports for Communist China. This policy is based on a number of considerations, among which are the fact that a state of unresolved conflict still exists between the United States and Communist China stemming from the latter's aggression against the United Nations in Korea and the fact that the Peiping regime continues to resort to force from time to time in the Taiwan Strait area. The emergency declared by President Truman in 1950 is still in effect.

Another factor of importance is that in the absence of diplomatic relations with Communist China, it is not possible for the Government to provide the customary protection to Americans traveling on the China mainland. In addition, the Communist Chinese have consistently maltreated Americans and continue to hold American citizens in prison as political hostages despite their pledge of September 10, 1955 to release them expeditiously. Another and important factor is the effort of the Communist Chinese to utilize trade and cultural contacts to promote political objectives hostile to our interests.

In August, 1957, the policy was modified in order to permit reporting in depth on what was happening on the mainland of China. This modification only applies to the full time correspondents of American news-gathering organizations which qualify under certain criteria set up by

the Secretary of State in collaboration with representatives of the press. Briefly, accreditation was given to those American news organizations which had demonstrated sufficient interest in foreign news coverage to maintain at least one full time American correspondent in Communist China for a period of six months or longer. It is significant that up to the present time only one American correspondent has been given a visa by the Communist Chinese regime.

In only three other instances have exceptions been made: (1) In December 1954 for the personal aide to the Secretary General of the United Nations proceeding to Peiping under United Nations Mandate to seek the release of American airmen of the United States command held prisoners of war in Korea. (2) In November, 1957 for an attorney to obtain evidence for the defense of clients charged with sedition, the court having held that non-validation of the passport for Communist China would result in the dismissal of the Government's case. (3) For visits of immediate family members of persons illegally incarcerated by the Communists.

In your case, I might add that as a Member of Congress your visit would be interpreted throughout Asia as well as by the Communist Chinese as a basic change in policy at the very time when the Communists are engaged in liquidating the Tibetan revolt, threatening war in the Taiwan Straits and showing increasing arrogance and contempt for international law and decency.

In conclusion and with respect to the inquiry posed in the penultimate paragraph of your letter I would like to offer the following quotation from the decision of the U. S. Court of Appeals for the District of Columbia Circuit by Circuit Judge Prettyman in the William Worthy, Jr. passport matter:

[57] "Judgment on what course of action will best promote our foreign relations has been entrusted to the President, not to the courts, journalists, scholars, or even 'public opinion.' He makes his decision with the aid of the Department of State, a large organization with stations through-

out the world, as well as on the basis of information received from all other parts of the Executive branch. We, if we had all this information, might reach a different decision. But the Constitution has wisely placed that burden in the hands of one who must justify his decisions before the electorate."

I am sorry that I cannot comply with your request.

Sincerely yours,

For the Secretary of State:

WILLIAM B. MACOMBER, JR.,
Assistant Secretary.

The Honorable
CHARLES O. PORTER,
House of Representatives,
Washington 25, D. C.

[70] Filed September 15, 1959. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2372-59

CHARLES O. PORTER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES, *Defendant*

MOTION FOR SUMMARY JUDGMENT WITH POINTS AND AUTHORITIES

Comes now plaintiff in the above entitled action, by his attorneys, and moves this Court, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to grant summary judgment for the plaintiff. This motion is based on the complaint, which has been verified by the affidavit of the plaintiff accompanying his motion for Preliminary Injunction; on the other matters contained in that affidavit; on the exhibits attached to the complaint; and upon a portion of the transcript of proceedings on September 1, 1959, before a Subcommittee of the Committee on Government Operations of the United States Senate, a copy of which is attached as Exhibit "A" to the original of this motion.

There is no genuine issue as to any material fact and the plaintiff is entitled to a judgment as a matter of law. As points and authorities for this motion, plaintiff respectfully refers the Court to the points and authorities attached to his Motion For [71] Preliminary Injunction which is pending before this Court.

Respectfully submitted.

JOSEPH L. RAUH, JR,
JOHN SILARD,
1631 K Street, N. W.,
Washington 6, D. C.
Attorneys for Plaintiff.

[64] Filed September 14, 1959. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2372-59

CHARLES O. PORTER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES, *Defendant*

AFFIDAVIT IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

Comes now Charles O. Porter, plaintiff in the above-entitled action, and, being duly sworn, states as follows:

1. I have read the complaint filed in this action on my behalf by my attorneys. I affirm on information and belief that each of the statements contained in paragraphs 6, 7 and 8 of that complaint are true, and I affirm on my own knowledge that every other statement contained in that complaint is true.

2. Irreparable injury is being caused by the limitation placed upon my passport by the defendant, his agents and employees in the Department of State, rendering that passport "not valid for travel . . . those portions of China . . . under Communist control." As a Member of the United States Congress, representing the Fourth Congressional District in the State of Oregon, I am planning on or about November 5, 1959, to leave for the Orient on Congressional business in connection with my Congressional [65] Committee assignment, stopping at Japan and Okinawa and possibly Formosa and Hong Kong. I deem it necessary in connection with that trip to the Orient, in order fully and knowledgeably to perform my legislative functions as a Member of Congress, to visit Red China to gain first hand information concerning conditions there, and also as to the character, purposes and designs, domestic and

international, of the political leadership of that Nation, and the potentialities and circumstances of trade between Red China and the United States.

3. Unless a preliminary injunction is granted, the limitation upon my passport will prevent me from making my visit to Red China in connection with my forthcoming trip to the Orient. Inasmuch as that trip would be of substantial benefit to me in my duties at the next session of Congress in connection with various legislation, it is particularly necessary that I have the opportunity prior to the next session of the Congress, in connection with my forthcoming trip to the Orient, to make my contemplated visit to Red China.

CHARLES O. PORTER.

Suscribed and sworn to before me this 11 day of September, 1959.

/s/ TRUMAN WARD,
Notary Public.

My Commission expires June 14, 1961.

[159] Filed September 25, 1959. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2372-59

CHARLES O. PORTER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES, *Defendant*

PLAINTIFF'S NOTICE TO ANSWER INTERROGATORIES

The named Defendant, Christian A. Herter, is requested to answer the following interrogatories pertaining to the present case in accordance with the Federal Rules of Civil Procedure pursuant to oral stipulation between the parties said interrogatories to be answered prior to September 28, 1959.

1. On June 10, 1959 there was addressed to you a letter from Congressman Charles O. Porter in which the Congressman requested a passport which would permit him to visit Communist China during the latter part of this year. On July 2, 1959, a reply to that letter was addressed to Congressman Porter "For the Secretary of State" by William B. Macomber, Jr., Assistant Secretary, stating in part, "I am sorry that I cannot comply with your request." Please state whether

(a) At any time before July 3, 1959 you had read the letter of Congressman Porter of June 10, 1959 or had been advised of the contents thereof, and whether

[160] (b) At any time before July 3, 1959 you had read the letter of July 2, 1959 by William B. Macomber, Jr., or had been advised of its contents.

2. In a news conference of February 5, 1957 by then Secretary of State Dulles, the text of which was released by the State Department as "authorized for direct quota-

tion," Secretary Dulles stated that the Department's policy of refusing passports valid for travel to Red China "is in no sense at all dictated by a desire to withhold from the American people any information about Communist China. It is solely dictated by the fact that we do not want to see the Chinese Communists gain their ends by the means of holding Americans in jail." Is it the present policy of the Department of State not to allow American citizens to travel to Communist China and not to issue passports permitting such travel? If so, please state

(a) The reason or reasons for such present policy, and

(b) The occasion and date when the present policy was decided upon by you or your predecessor in office.

3. Is the reason or one of the reasons why the Department of State presently refuses passports valid for travel to Communist China by American citizens that such travel might be interpreted as a change of our foreign policy toward Communist China? If so, please state whether it is your intention to continue to refuse passports valid for travel to Communist China until and unless there has in fact been a change of our foreign policy towards Communist China.

[161] 4. By a letter dated December 12, 1958 from William B. Macomber, Jr., Assistant Secretary of State, Congressman Charles O. Porter was informed that "If a member of Congress were to apply for a passport valid for travel to Communist China, his application would receive the Department's fullest consideration in the light of the Government's general policy and any exceptions which may be made thereto." Please state what is the general policy of the Department of State with respect to the granting or denial of applications by *members of Congress* for travel to Communist China, state what if any exceptions may be made to that policy, and state the date and the occasion upon which you or your predecessor in office personally approved that policy.

5. Have you at any time personally promulgated any policy with respect to the granting or denial of applications by members of Congress for travel to Communist China?

If so, please state the nature and location of any written document which evidences such promulgation.

6. If you have not personally promulgated any policy with respect to the granting or denial of applications by members of Congress for travel to Communist China, do you plan at any time in the foreseeable future to review this subject with a view towards promulgating such policy and if so, at what time do you contemplate such a review?

7. Please state in how many instances during the last five years United States citizens have been granted a passport valid for travel to Albania, Bulgaria, Communist China, and any other [162] country or area as to which at the time of such grant United States passports in general were being marked not valid for travel. Please also furnish a list including each such instance, stating the date of and reason for the grant, and the country or area to which the grant was made, as well as the name and position of the State Department official who authorized the grant.

Respectfully submitted,

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1631 K Street, N. W.
Washington 6, D. C.
Attorneys for Plaintiff.

CERTIFICATE OF SERVICE

I have this 18th day of September, 1959, served a copy of this Plaintiff's Notice to Answer Interrogatories upon counsel for the defendant, Oren H. Waterman, Attorney, United States Department of Justice, by leaving a copy at this office, Room 2509, Department of Justice.

JOHN SILARD.

[156] Filed September 25, 1959. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2372-59

CHARLES O. PORTER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES, *Defendant*

DEFENDANT'S ANSWERS TO PLAINTIFF'S INTERROGATORIES

1. (a) Prior to July 3, 1959, I was advised of the contents of plantiff's letter of June 10, 1959.

(b) Prior to July 3, 1959, I was advised of the contents of Assistant Secretary Macomber's letter of July 2, 1959.

2. Yes.

(a) Reasons for the present policy have been summarized in Assistant Secretary Macomber's letter of July 2, 1959, to the plaintiff, which letter is attached as Exhibit B to the complaint in this action. Additionally, reasons for the present policy have been set forth more fully in public pronouncements by my immediate predecessor in office and other officials of the Department of State.

(b) The present policy was publicly announced on May 1, 1952.

[157] 3. The refusal to validate passports for travel to Communist China is one of the means of implementing the present policy of the United States toward the Chinese Communist regime.

The Department of State will continue its policy of not issuing passports which permit travel to Communist China so long as, under all of the circumstances, the continuation of that policy is deemed to serve the national interests.

4. There is no separate policy regarding travel by Members of Congress to Communist China. The question of what exceptions may be made to the general policy regarding the travel thereto of citizens, including Members of Congress, is really a question of how the Executive might conduct the foreign relations of the United States in the future. It is not possible for me to say now how the Executive would exercise his discretionary authority with regard to the unknown situations of the future.

5. No.

6. As stated in the answer to interrogatory number 4, there is no separate policy regarding travel by Members of Congress to Communist China. All aspects of foreign policy, however, are under constant study. This continuing process would, of course, include review of the policy regarding travel of citizens, including Members of Congress, to Communist China.

7. The nature of the exceptions made regarding travel to Communist China has been set forth in Assistant Secretary Macomber's letter of July 2, 1959, attached as Exhibit B to the complaint in this action.

[158] An attempt to furnish complete information of the character requested as to other areas would necessitate the detailed review of several million individual passport files.

Moreover, I believe that further answer to this question would involve either information which is not relevant because foreign policy considerations underlying restrictions on travel to Communist China and exceptions thereto are separate and distinct from such considerations as to other areas where travel has been restricted, or information which relates to the process of decision by the Executive in the conduct of foreign affairs.

CHRISTIAN A. HERTER.

Subscribed and sworn to before me this 23rd day of September, 1959.

LILLIE B. DOWRICK,
Notary Public.

My Commission expires February 28, 1962.

[127] Filed September 25, 1959. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2372-59

CHARLES O. PORTER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES, *Defendant*

DEFENDANT'S MOTION TO DISMISS OR IN THE ALTERNATIVE CROSS-MOTION FOR SUMMARY JUDGMENT

Now comes the Defendant, Christian A. Herter, Secretary of State, and moves this Honorable Court as follows:

I. To dismiss the Complaint on the grounds that the Court lacks jurisdiction over the subject matter of the Complaint and the Complaint has failed to state a claim upon which relief may be granted.

II. Or in the alternative to enter summary judgment in this action, pursuant to Rule 56 of the Federal Rules of Civil Procedure, upon the ground that the pleadings and admissions on file show that there is no genuine issue of material fact and that Defendant is entitled to judgment as a matter of law.

[128] This Court is respectfully referred to Defendant's Memorandum of Points and Authorities attached hereto.

Respectfully submitted,

/s/ ORAN H. WATERMAN,
/s/ ANTHONY F. CAFFERKY,
/s/ HERBERT E. BATES,
Attorneys, Department of Justice,
Attorneys for Defendant.

[149] Filed September 25, 1959. Harry M. Hull, Clerk

DEFENDANT EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2372-59

CHARLES O. PORTER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES, *Defendant*

NOTICE TO ANSWER INTERROGATORIES

The named Plaintiff, Charles O. Porter is requested to answer the following interrogatories numbered 1 through 7 pertaining to the present case in accordance with the Federal Rules of Civil Procedure pursuant to oral stipulation between the parties said interrogatories to be answered as soon as possible.

1. Your affidavit in support of your Motion for Preliminary Injunction indicates that your proposed trip to the Orient is in connection with your "Congressional Committee assignment." Please set forth the designation of this Committee and your position in connection with such Committee.

2. You are requested to furnish a copy of your official assignment and authorization for your travel to the Orient acknowledged by the appropriate Committee or Subcommittee or other congressional authority.

3. If your answer to the foregoing indicates that your Congressional assignment does not specifically authorize your travel to Communist China, you are requested to set forth in detail any official authority upon which you base your request to travel to that country.

[150] 4. In connection with your above-mentioned Congressional Committee assignment, please state whether or

not you formally or informally requested authority from this Committee or other Congressional authority to travel to Communist China.

5. If you so requested authority, please state:

a. To whom was this request made.
b. The results of such request.

6. Have you secured or attempted to secure a visa or other form of permission from officials of the Chinese Communist Government or representative thereof permitting your travel within the borders of Red China?

7. In the event your answer to the foregoing question is in the negative, please state whether or not you have been given any assurance from the Chinese Communist Government that you will receive a visa or other official document, and the conditions upon which it will be granted.

Respectfully submitted,

/s/ Oran H. Waterman,
/s/ Anthony F. Cafferky,
/s/ Samuel L. Strother,
Attorneys, Department of Justice,
Washington, D. C.
Attorneys for Defendant.

[151] DEFENDANTS EXHIBIT A-1

Civil Action No. 2372-59

Filed September 25, 1959. Harry M. Hull, Clerk

ANSWERS BY PLAINTIFF, CHARLES O. PORTER TO INTERROGATORIES SUBMITTED BY DEFENDANT, CHRISTIAN A. HERTER IN CIVIL ACTION NO. 2372-59 IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

1. Post Office and Civil Service Committee; ranking Democratic member of Civil Service Sub-Committee. My trip to the Orient is to investigate personnel problems of overseas employes.

3. The sole authority on which I base my request for permission to go to China is my position as a United States Representative.

4. I have made no such request and no authority has been given to me.

6. No. If I get permission, I shall then make such a request.

7. I have requested none and I have received none.

CHARLES O. PORTER.

Subscribed and sworn to before me this 17th day of September, 1959

R. E. JONES,
Notary Public for Oregon.

My commission expires: 7/11/60

[152] House of Representatives, U.S. Committee on Post Office and Civil Service

Washington, D.C.

September 4, 1959

Honorable Neil H. McElroy,
Secretary of Defense,
Washington 25, D.C.

Dear Mr. Secretary:

The Honorable Charles O. Porter, Member of Congress, will travel to Okinawa and Japan during the recess of Congress, in official capacity for the Committee on Post Office and Civil Service, House of Representatives. This Committee has jurisdiction over all civilian employee matters, including those of the Department of Defense, and this trip will be in the interest of national defense.

It will be appreciated if arrangements can be made for Congressman Porter to use Military Air Transport Service to and from these areas. All other expenses will be borne by him.

With best wishes, I am

Sincerely yours,

Tom Murray,
Chairman.

[153] House of Reperesentatives, U.S. Committee on Post Office and Civil Service

Washington, D.C.

September 5, 1959

Honorable Christian A. Herter,
House of Representatives,
Washington 25, D.C.

My Dear Mr. Secretary:

The Honorable Charles O. Porter, a Member of this Committee, will be in Japan during the recess of Congress. I have asked him to take care of matters pertaining to civilian employee problems in that area.

It is requested that the appropriate officials of the Foreign Service in Japan be advised of his visit so that necessary arrangements may be made to provide counterpart funds upon his request, pursuant to the provisions of Section 502(b) of the Mutual Security Act of 1954, as amended.

Such other assistance and courtesies as may be extended to Congressman Porter by your representatives in Japan will be appreciated.

With best wishes, I am

Sincerely yours,

Tom Murray,
Chairman.

[36] Opinion of the Court

The Court: There is no need to make any reservations for future time. I am prepared to decide this case immediately.

First of all, I believe it is governed by the Frank case and the Worthy case. You are asking this Court to interfere with the Executive function of the foreign policy of the United States; that is number two; and number three, you are asking, in the circumstances, that an ordinary citizen, who happens to be a Congressman, not traveling on official congressional business, be granted a passport when the Secretary of State concludes it would be to the best interests of the country not to do so.

[166] Filed October 1, 1959. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 2372-59

CHARLES O. PORTER, *Plaintiff*,

v.

CHRISTIAN A. HERTER, INDIVIDUALLY AND AS SECRETARY OF STATE OF THE UNITED STATES, *Defendant*

ORDER

This cause having been heard on Plantiff's Motion for Summary Judgment and Defendant's Cross-Motion for Summary Judgment, and the Court having considered all of the record, the pleadings, affidavits, exhibits and memoranda of Points and Authorities filed herein and there having been a full and complete hearing and the Court having found that there is no genuine issue as to any material fact and that the Defendant is entitled to judgment as a matter of law.

Therefore it is now ORDERED by the Court on this 30th day of September, 1959 that Defendant's Cross-Motion for Summary Judgment be, and the same is hereby granted, and that Plaintiff's Motion for Preliminary Injunction and Motion for Summary Judgment be, and the same are hereby denied and the complaint be and the same is hereby dismissed, with costs to Plaintiff.

/s/ MATTHEW F. MCGUIRE,
Judge.

[165] Filed October 2, 1959. Harry M. Hull, Clerk

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil No. 2372-59

CHARLES O. PORTER, *Plaintiff*,

vs.

CHRISTIAN A. HERTER, *Defendant*

NOTICE OF APPEAL

Notice is hereby given this 2nd day of October, 1959, that Plaintiff hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 1st day of October, 1959, in favor of Defendant, against said Plaintiff, and denying judgment for the Plaintiff.

JOHN SILARD,
Attorney for Plaintiff.

(8677-7)

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the District of Columbia Circuit
FILED
JAN 25 1960
Joseph W. Stewart
CLERK

No. 15,394

CHARLES O. PORTER,
Appellant,

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

JOSEPH L. RAUH, JR.,
JOHN SILARD,
1631 K Street, N. W.,
Washington 6, D. C.,
Attorneys for Appellant.

Question Presented

The question presented is whether the Secretary of State has authority, under existing Presidential orders, statutes and constitutional provisions, to bar a Member of Congress from traveling to Communist China in pursuance of his legislative functions.

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15,394

CHARLES O. PORTER,

Appellant,

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Jurisdictional Statement

This is an appeal from a summary judgment granted appellee by the District Court on September 30, 1959 (J.A. 27). The jurisdiction of this Court rests on 28 U.S.C. 1291. Jurisdiction of the case below was based on D. C. Code §§ 11-305 and 11-306; 5 U.S.C. § 1009; and 28 U.S.C. §§ 1331, 1332, 2201, 2202.

Statement of the Case

Appellant is a Member of Congress representing the Fourth Congressional District of the State of Oregon. Since his election to the Congress, appellant has been actively involved and interested in the foreign affairs concerns of the United States, including especially those relating to

Communist China.[1] In connection with that interest, Congressman Porter had an extensive conversation in London in June of 1959 with the Second Secretary of the Chinese People's Republic's diplomatic delegation on subjects of concern to Communist China and the United States (see Congressional Record, September 1, 1959, p. 16,192). In order further to pursue his Congressional interest in these matters, appellant determined in June of 1959 to seek permission for a trip to Communist China to study conditions in that country and to appraise the character and purposes of its political leaders.

Congressman Porter holds a validly issued U. S. passport containing the endorsement that "This passport is not valid for travel to . . . those portions of China . . . under Communist control" (J.A. 1). On June 10, 1959, appellant therefore wrote to appellee, the Secretary of State, applying for a passport revision permitting him to visit Communist China (J.A. 3). Appellant informed the Secretary that: "The purpose of my visit is to learn about the conditions and potentialities of trade and other facts relating to our policies and legislative aspects." By letter of July 2, 1959, appellant received a response to his request from an Assistant Secretary written "for the Secretary of State"; that response, relying upon this Court's opinion in the *Worthy* case, turned down Congressman Porter's request for a passport valid for Communist China travel without any apparent consideration of the appellant's Congressional interest in making a visit to Communist China

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[1] Congressman Porter's special interest and concern in foreign relations matters is demonstrated by numerous of his speeches and insertions in the Congressional Record, as well as various bills and resolutions sponsored by him which are presently pending and which bear upon foreign relations matters. Some of these pending bills and resolutions sponsored by appellant are: H.R. 4295, H.R. 6692, H.R. 7099, H.R. 13845, H. Con. Res. 138, H. Con. Res. 208, H. Con. Res. 297.

(J.A. 10). Being informed thereafter that there were no other administrative remedies open to him (J.A. 4), appellant filed this suit against the Secretary of State on August 27, 1959.

In his complaint, appellant asserts that the Secretary's action has impaired his rights as a Member of Congress as well as his freedom of travel as an American citizen, and that there is no statutory basis authorizing such limitation upon his freedom of movement. Appellant seeks declaratory and mandatory remedies for removal of that passport limitation (J.A. 5).

On September 15, 1959, appellant moved for summary judgment (J.A. 13) on the basis of the complaint verified by appellant's affidavit (J.A. 14-15). In his affidavit appellant pointed out that he deemed it necessary

> "in order fully and knowledgeably to perform my legislative functions as a Member of Congress, to visit Red China to gain first hand information concerning conditions there, and also as to the character, purposes and designs, domestic and international, of the political leadership of that Nation, and the potentialities and circumstances of trade between Red China and the United States."

Appellant's motion was also supplemented by a transcript of the testimony before a Senate Subcommittee given by a representative of the Department of State, conceding that on a trip to Communist China appellant would have the full protection of the government of that nation (R. 72-118), and by Secretary Herter's answers to interrogatories propounded by appellant demonstrating that the Department has no separate policy concerning travel to Communist China by Members of the Congress (J.A. 20).

On September 25, 1959, appellee filed a cross-motion for

summary judgment (J.A. 21). The motions came on for hearing before the District Court on September 28, 1959; after hearing argument from counsel for appellant, the Court ruled for the appellee on the following grounds (J.A. 26):

> "First of all, I believe it is governed by the Frank case and the Worthy case. You are asking this Court to interfere with the Executive function of the foreign policy of the United States; that is number two; and number three, you are asking, in the circumstances, that an ordinary citizen, who happens to be a Congressman, not traveling on official congressional business, be granted a passport when the Secretary of State concludes it would be to the best interests of the country not to do so."

Pursuant to this ruling, on September 30, 1959 the District Court entered an order granting summary judgment for appellee (J.A. 27); appellant docketed his appeal in this Court on October 5, 1959.[2]

The important issue of first instance presented by this appeal is whether the Secretary of State has authority, under existing Presidential orders, statutes and constitutional provisions, to bar a Member of Congress from traveling to Communist China in pursuance of his legislative functions.

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[2] At the time appellant docketed his appeal in this Court, the *Worthy* and *Frank* decisions were pending before the Supreme Court on petitions for certiorari. Appellant therefore asked the Supreme Court, if review was granted in *Worthy* and *Frank*, to grant review to appellant prior to judgment in this Court. On December 7, 1959, the Supreme Court refused review in the *Worthy* and *Frank* cases and, of course, in the instant case as well.

Statutes and Regulations Involved

22 U.S.C. § 211(a)

The Act of July 3, 1926, 44 Stat. 887, 22 U.S.C. § 211(a) provides, in pertinent parts, as follows:

> "The Secretary of State may grant and issue passports, and cause passports to be granted, issued, and verified in foreign countries by diplomatic representatives of the United States, and by such consul generals, consuls, or vice consuls when in charge, as the Secretary of State may designate, and by the Chief or other executive officer of the insular possessions of the United States, under such rules as the President shall designate and prescribe for and on behalf of the United States, and no other person shall grant, issue, or verify such passports."

Extract from 8 U.S.C. § 1185

Section 215 of the Immigration and Nationality Act of 1952, 66 Stat. 190, 8 U.S.C. § 1185, as codified, provides in pertinent part:

> "§ 1185. Travel control of citizens and aliens during war or national emergency—Restrictions and prohibitions on aliens.
>
> (a) When the United States is at war or during the existence of any national emergency proclaimed by the President, * * * and the President shall find the interests of the United States require that restrictions and prohibitions in addition to those provided otherwise than by this section be imposed upon the departure of persons from and their entry into the United States, and shall make public proclamation thereof,

it shall, until otherwise ordered by the President or the Congress, be unlawful—

(1) (There follow restrictions enumerated (1) through (7) not here pertinent.)

(b) After such proclamation as is provided for in subsection (a) of this section has been made and published and while such proclaimation is in force, it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the United States unless he bears a valid passport."

Extract from Presidential Proclamation No. 3004 January 17, 1953, 67 Stat. c. 31

"Whereas Section 215 of the Immigration and Nationality Act, enacted on June 27, 1952 (Public Law 414, 82nd Congress; 66 Stat. 163, 190), authorizes the President to impose restrictions and prohibitions in addition to those otherwise provided by that act upon the departure of persons from, and their entry into, the United States when the United States is at war or during the existence of any national emergency proclaimed by the President * * * and when the President shall find that the interests of the United States so require; and

Whereas the national emergency the existence of which was proclaimed on December 16, 1950, by Proclamation 2914 still exists; and

Whereas because of the exigencies of the international situation and of the national defense then

existing Proclamation No. 2523 of November 14, 1941, imposed certain restrictions and prohibitions in addition to those otherwise provided by law, upon the departure of persons from and their entry into the United States, and

Whereas the exigencies of the international situation and of the national defense still require that certain restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from and their entry into the United States:

Now, Therefore, I, Harry S. Truman, President of the United States of America, acting under and by virtue of the authority vested in me by section 215 of the Immigration and Nationality Act and by section 301 of title 3 of the United States Code, do hereby find and publicly proclaim that the interests of the United States require that restrictions and prohibitions, in addition to those otherwise provided by law, be imposed upon the departure of persons from, and their entry into, the United States; and I hereby prescribe and make the following rules, regulations, and orders with respect thereto:

1. The departure and entry of citizens and nationals of the United States from and into the United States, including the Canal Zone, and all territory and waters, continental or insular, subject to the jurisdiction of the United States, shall be subject to the regulations prescribed by the Secretary of State and published as section 53.1 to 53.9 inclusive, of title 22 of the Code of Federal Regulations. Such regulations are hereby incorporated into and made a part of this proclamation; and the Secretary of State is hereby authorized

to revoke, modify, or amend such regulations as he may find the interests of the United States to require

. . .

5. I hereby direct all departments and agencies of the Government to cooperate with the Secretary of State in the execution of his authority under this proclamation and any subsequent proclamation, rule, regulation, or order issued in pursuance hereof; and such departments and agencies shall upon request make available to the Secretary of State for that purpose the services of their respective officials and agents. I enjoin upon all officers of the United States charged with the execution of the laws thereof the utmost diligence in preventing violations of section 215 of the Immigration and Nationality Act and proclamation, including the regulations of the Secretary of State incorporated herein and made a part hereof, and in bringing to trial and punishment any persons violating any provisions of that section or of his proclamation.

To the extent permitted by law, this proclamation shall take effect as of December 24, 1952."

Extracts from Executive Order No. 7856 of 1938, March 31, 1938, 3 F. R., Part 51

§ 51.75 *Refusal to issue passport.* The Secretary of State is authorized in his discretion to refuse to issue a passport, to restrict a passport for use only in certain countries, to withdraw or cancel a passport already issued, and to withdraw a passport for the purpose of restricting its validity or use in certain countries.

§ 51.76 *Violation of passport restrictions.* Should a person to whom a passport has been issued knowingly use or attempt to use it in violation of the conditions

or restrictions contained therein or of the provisions of the rules in this part, the protection of the United States may be withdrawn from him while he continues to reside abroad.

§ 51.77 *Secretary of State authorized to make passport regulations.* The Secretary of State is authorized to make regulations on the subject of issuing, renewing, extending, amending, restricting, or withdrawing passports additional to the rules in this part and not inconsistent therewith.

Extract from Regulations Issued by the Secretary of State, 22 C.F.R., Part 53

§ 53.1 *Limitations upon travel.* No citizen of the United States or person who owes allegiance to the United States shall depart from or enter into or attempt to depart from or enter into the continental United States, the Canal Zone, and all territories, continental or insular, subject to the jurisdiction of the United States, unless he bears a valid passport which has been issued by or under authority of the Secretary of State and which, in the case of a person entering or attempting to enter any such territory, has been verified by an American diplomatic or consular officer either in the foreign country from which he started his journey, or in the foreign country in which he was last present if such country is not the one from which he started his journey, or unless he comes within one of the exceptions prescribed in § 53.2 and § 53.3. No fee shall be collected by a diplomatic or consular officer of the United States for or in connection with such verification.

Statement of Points

1. The court below erred in holding that appellant's trip to Communist China would be in the capacity of an ordinary citizen rather than as a Congressman traveling on official business.

2. The court below erred in holding this case to be governed by the *Frank* and *Worthy* decisions.

3. The court below erred in refusing the relief requested by appellant and granting judgment against him.

Summary of Argument

I

The *Worthy* and *Frank* decisions do not control the instant case which involves a wholly unjustified executive impairment of a vital legislative prerogative. Appellant desires to visit Communist China for the more knowledgeable performance of his Congressional functions, including both sponsoring of legislation and debating and voting upon legislation on the floor of the House of Representatives bearing in various ways upon the subject of Communist China. The District Court, however, ruled that, absent a committee assignment, a Member of Congress desiring to make a visit of inspection to another nation in order to gain firsthand knowledge in connection with his Congressional duties remains "an ordinary citizen . . . not traveling on official Congressional business".

While Congressional committees constitute the eyes and ears of the Congress in many important particulars, no judicial authority or legal commentator has yet suggested that individual Congressmen cannot use their own eyes and ears to obtain the knowledge and opinion upon which is predicated their discussion and vote on the floor of the House. There is ample recognition in 170 years of Con-

gressional history of the fact that most of the activities of Congressmen have no connection with their committee assignments, but nevertheless constitute official business which is attended by all the prerogatives of their public office.

Moreover, unlike the situation in the newsmen cases, there is no possible justification for the Secretary's refusal to permit appellant to visit Communist China. The travel ban justification accepted by this Court in *Worthy* was that American newsmen traveling in Communist China might be placed *in trouble or danger* there, creating serious international difficulties for our Government because of our limited ability to afford protection to citizens traveling Communist China. It is equally clear, and indeed conceded by the Government, that this consideration of danger or trouble in Communist China is *inapplicable* to Congressman Porter who, if permitted to enter Communist China, would obviously be there under the solicitous protection of its government. It is clear, therefore, that the Government has not yet suggested even a plausible theory which, absent the "danger or trouble" rationale which is inapplicable to appellant, could justify prohibiting visits by Members of Congress to Communist China. It is submitted that in this case there has been direct and unjustified executive impairment of the time-honored legislative prerogative of travel and inspection, and that the Secretary should be directed to remove an irrational and stultifying ban on official Communist China visits by Members of the Congress of the United States.

II

There is an additional ground for the granting of the relief requested by appellant, arising from the fact that the Secretary's impairment of liberty of travel lacks the

necessary statutory foundation for Executive encroachment upon general liberties. While we are cognizant that a panel of this Court in *Worthy* has ruled to the contrary, we respectfully urge that the ruling to that effect is erroneous and requires this Court's en banc review, especially in light of developments subsequent to the *Worthy* decision.

The answer to any contention that the President has "inherent power" under the Constitution to impose area restrictions on liberty of travel by American citizens is that the President has not *exercised* any such power. Nor is there statutory authorization for the Communist China travel ban. We submit that 8 U.S.C. § 1185, relied upon in *Worthy,* cannot support the Secretary's action in the instant case any more than in *Kent* v. *Dulles,* 357 U.S. 116, 129, where the Supreme Court expressly held that "§ 1185 and § 211a do not delegate to the Secretary the kind of [passport restriction] authority exercised here". Moreover, far from relying on this Court's *Worthy* opinion, the Administration has continued to press for a passport denial and area restriction law, citing "the total lack of legislative authority to deny passports"; and more recently, before the Supreme Court, the Government has largely abandoned reliance upon statutory authorization for its Communist China travel ban. The Government's request for specific Congressional authorization and its reversion before the Supreme Court to the "inherent power" argument, has given emphasis to the weakness of this Court's *Worthy* opinon on this important subject and the need for the Court's en banc review of the issue.

Argument

As we seek to demonstrate in this brief, the Secretary of State has no authority, under existing Presidential orders, statutes and contitutional provisions, to bar a Member of Congress from traveling to Communist China in pursuance of his legislative functions. Contrary to the ruling of the District Court, nothing in this Court's *Worthy* or *Frank* opinions warrants a denial of appellant's claim for relief against a wholly unjustified executive impairment of a vital legislative prerogative (see *infra,* Point I, pp. 13 to 26). And in any event, as we contend in Point II of our argument (*infra*, pp. 26 to 30), this Court should review en banc the question erroneously resolved in *Worthy* concerning the adequacy of constitutional and statutory authority for the Secretary's imposition of area restrictions on travel by United States citizens.

I

The Worthy and Frank Decisions Do Not Control the Instant Case Which Involves a Wholly Unjustified Executive Impairment of a Vital Legislative Prerogative.

The District Court ruled against appellant on the ground that this Court's decisions in *Worthy* v. *Herter,* — App. D. C. —, 270 F. 2d 905 and *Frank* v. *Herter,* — App. D. C. — (decided July 6, 1959) control the instant case. We submit that ruling to be in error: first, because in the instant case the Secretary's action impairs a public interest far more vital than that involved in the newsmen cases—the exercise of a Congressman's prerogative to make a visit of inspection for legislative purposes—and second, because the "danger or trouble" consideration accepted by this Court as the justification for the ban on newsman travel

in Communist China is conceded by the Government to be inapplicable to appellant, a Member of Congress.

A. *In Making a Visit of Inspection to Communist China, Appellant Would Be Exercising the Prerogatives and Duties of His Congressional Office.*

Appellant desires to visit Communist China for the more knowledgeable performance of his Congressional functions, including both sponsoring of legislation and debating and voting upon legislation on the floor of the House of Representatives bearing in various ways upon the subject of Communist China. Certainly, the personal knowledge and information which Congressman Porter could gain by visiting Communist China and conversing with its political leaders would materially assist him in performing his Congressional duties.[3] Indeed, the Government does not question that the refusal of a Communist China passport to appellant denies him firsthand information of tangible benefit in the performance of his legislative functions. Under these circumstances, appellant's requested visit to Communist China would clearly be in pursuit of his official duties rather than any private objectives.

The District Court, however, ruled that, absent a committee assignment, a Member of Congress desiring to make a visit of inspection to another nation in order to gain firsthand knowledge in connection with his Congressional duties remains "an ordinary citizen . . . . not traveling on official Congressional business". That ruling is clearly erroneous, for the great preponderance of duties that Congressmen are

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[3] It should be noted that the informing function of the Congress is one which the Supreme Court has most recently emphasized and upheld as a vital part of the legislative process. *Barenblatt* v. *United States*, 360 U.S. 109.

elected to perform and do perform every day of the year do not fall within their committee assignments.[4]

That numerous activities of Congressmen, although they are not in connection with any committee assignment nor on the floor of the chamber, are nevertheless in pursuance of their official functions, finds its recognition in the traditional practice of both houses relating to the franking privilege, office expenditures, disbursements for letters, telegrams, telephone and the like. See Hinds and Cannon Precedents of the House of Representatives, vol. II, ch. 41; vol. VI, ch. 174. The traditional practice of reimbursing Members for such non-committee activities has in recent years been codified in specific statutory enactments, providing for such matters as postage allowances (2 U.S.C. §§ 42a, 42c); stationery (2 U.S.C. §§ 46a, 46b); franking privilege (39 U.S.C. § 327); long distance telephone, telegraph and radio telegraph allowances (2 U.S.C. §§ 46c, 46d, 46f, 46g); television and radio recordings for public distribution (2 U.S.C. § 123b); and allowances for home state office space and expenses (2 U.S.C. §§ 52, 53, 122, 122a). These statutes provide a Congressman or Senator with funds for various *non-committee* "official business", "strictly official telegrams, cablegrams and radiograms", "official office expenses incurred in his State" and the like. Yet, if the District Judge be correct that outside committee or the chamber, Members of Congress can act only in their private capacities, these enactments must all be invalid for they reimburse specifically for "official" business conducted by the Member neither in committee nor on the

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[4] For instance, Congressman Porter, who has no committee assignment bearing upon atomic energy, was nevertheless invited and attended as an official observer at the 1958 nuclear tests in the Pacific conducted by the Atomic Energy Commission, and expenses of his trip were recognized by the executive branch as "official" Congressional business.

floor of the chamber, but rather in his home state, in the nation and throughout the world.

Further demonstration of the principle that Congressmen may perform public duties beyond the confines of the House or a committee, arises from Congressional contempt adjudications for attacks upon Members of the Congress in public places in and outside the District of Columbia. Such contempt adjudications by the House of Representatives arose from an 1832 attack in the District of Columbia upon Congressman Stanberry of Ohio (see Hinds and Cannon, Precedents of the House of Representatives, vol. 2, ch. 51, §§ 1616-1619), a similar attack in a Washington hotel in 1865 upon Congressman Kelley of Pennsylvania (*Id.*, § 1625), and a 1913 street assault upon Congressman Sims of Tennessee, attacked by one Charles Glover for words he had spoken in a previous Congress (*Id.*, vol. 6, ch. 184, §§ 332-33). Probably the most apposite of such precedents relates to the punishment for contempt of Congress of Patrick Woods for an assault in 1870 upon another Congressman Charles Porter, in his home town of Richmond, Virginia. The debate prior to the contempt citation provides significant recognition of the official status of a Congressman wherever he is pursuing his public commitments. As stated during the debate (41st Cong., 2d Sess., Cong. Globe, p. 5254), in attacking Congressman Porter, Woods had invaded

> "a privilege of the whole people of the United States to be unmolested in the persons of their Representatives during the entire session of Congress, so that laws may be enacted by themselves and for themselves through their Representatives, without let or hindrance from any man in Virginia or out of Virginia."

What is clear from Congressional statutes and contempt adjudications has also been recognized by the United States Supreme Court in its historic decision in *Kilbourn* v. *Thompson,* 103 U.S. 168, where the Court affirmed that the "exercise of the functions of that [Congressional] office may be accomplished outside the walls of the Representatives' Chamber". The Court quoted with approval the following analysis of legislative immunity in the decision by the Supreme Court of Massachusetts in *Coffin* v. *Coffin,* 4 Mass. 1:

> "I will not confine it to delivering an opinion, uttering a speech, or haranguing in debate, but will extend it to the giving of a vote, to the making of a written report and to every other act resulting from the nature and the execution of the office. And I would define the article as securing to every member exemption from prosecution for everything said or done by him as a representative, in the exercise of the functions of that office without inquiring whether the exercise was regular, according to the rules of the House, or irregular and against those rules. *I do not confine the member to his place in the House; and I am satisfied that there are cases in which he is entitled to this privilege when not within the walls of the Representatives' Chamber"* (emphasis supplied).

An interesting analogy from the judicial area is the case of *In re Neagle,* 135 U.S. 1, where the Supreme Court held Mr. Justice Field to have been in the discharge of his official duties at the time of an attack upon him while he was eating breakfast at a railroad station between Los Angeles and San Francisco. The Court made the following most pertinent observations concerning the oc-

casions upon which a judge is executing his office, including even "*investigations made in his own room*" (at pp. 55-56):

> "In order to enable him to perform this duty Mr. Justice Field had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called 'chambers.' This chamber work is as important, as necessary, as much a discharge of his official duty, as that performed in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court."

Certainly, if a judge is performing official adjudicatory investigation "in his own room, wherever he may be", a Congressman who draws upon all sources of information available for performance of his legislating function rather than upon any narrow adjudicatory record, is even more directly engaged in the performance of his office, when for purposes of enlightenment, he visits a nation whose

activities, intentions and purposes, domestic and international, have critical bearing upon numerous legislative measures regularly pending before the Congress.

Examples and precedents could be multiplied but there is no need, for it is clear that the District Court imposed a wholly untenable limitation upon the exercise of the office of a Member of the Congress. While Congressional committees constitute the eyes and ears of the Congress in many important particulars, no judicial authority or legal commentator has yet suggested that individual Congressmen cannot use their own eyes and ears to obtain the knowledge and opinion upon which is predicated their discussion and vote on the floor of the House. There is ample recognition in 170 years of Congressional history of the fact that most of the activities of Congressmen have no connection with their committee assignments, but nevertheless constitute official business which is attended by all the prerogatives of their public office.

If, as we contend, Members of Congress are exercising their public office in traveling about obtaining pertinent firsthand information, then certainly the record in this case is clear that appellant's proposed trip to Communist China represents a public visit of inspection for legislative purpose rather than some private undertaking. Certainly nothing in the record rebuts the Congressman's affidavit that the purpose of his visit to Communist China would be

> "in order fully and knowledgeably to perform my legislative functions as a Member of Congress . . . to gain first hand information concerning conditions there, and also as to the character, purposes and designs, domestic and international, of the political leadership of that Nation, and the potentialities and circumstances

of trade between Red China and the United States" (J.A. 14).[5]

The suggestion that Congressman Porter's Communist China trip would be anything other than the execution of his Congressional functions is erroneous both as a matter of fact and of law. Certainly far graver public interests than those involved in *Worthy* and *Frank* are thus impaired by the Secretary's refusal to permit a Member of the Congress to make a visit of inspection to Communist China. We turn now to consider whether the impairment of appellant's Congressional prerogatives by the Secretary's refusal to permit him to make a visit of inspection to Communist China can be justified by any valid countervailing interest of the executive department.

B. *Unlike the Situation in the Newsmen Cases, There is No Possible Justification for the Secretary's Refusal to Permit a Member of Congress to Visit Communist China.*

In *Worthy* and *Frank* this Court reviewed the considerations advanced in support of the State Department policy against Communist China travel by American newsmen and upheld that policy against freedom of press contentions advanced by the two newsmen there involved. Viewed in the context of the international incident which might arise from an altercation during the "wanderings of uninhibited American newsmen in China" (270 F. 2d at 913), this Court found the ban on their travel not to be arbitrary Governmental action.

But the justification for the policy in the newsmen cases

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[5] Such affidavit evidence of performance of official duty, sufficient to sustain the burden of proof on a trial on the merits (see *Howard* v. *Lyons*, 360 U.S. 593, 597-8), is *a fortiori* sufficient on summary judgment.

is inapplicable to a Member of the Congress. In *Worthy* this Court characterized the argument advanced by the Secretary in justification of his ban on Communist China travel as follows (at 909):

> "The Secretary has given two separate but related reasons for this reduction of Worthy's freedom: (1) The areas named are potential or actual 'trouble spots', where the presence of American citizens may place them in danger and further irritate our relations with the named countries and their allies. (2) The presence of American citizens in these areas and the official approval of their presence there will impede the execution of American foreign policy in relation both to these countries and to other countries."

The Court went on to emphasize in numerous places in its opinion that it is the inability of our Government to protect American citizens in "danger" or in "trouble" in Communist China which gives validity to the Department's travel ban. The Court referred to the Secretary's "determination that certain areas outside this hemisphere are *trouble spots, or danger zones* . . ." (at 910); it noted "the assistance the Congress requires the President to afford an American *citizen in trouble abroad*" (*id.*); and it went on to hold that "the designation of a foreign area as a potential trouble spot is a 'foreign affair' and the *extrication of a citizen from trouble* in a foreign country is a 'foreign affair'" (*id.*). Finally, having postulated the possibility of serious incidents involving danger or difficulty for newsmen in Communist China, the Court summed up its holding in *Worthy* in the following sentence (at 911):

> "We think that, if the Executive foresees that the presence of American citizens in a designated foreign

> area may, by reason of military or political conditions there, evolve into, or be the occasion of, a clash, diplomatic or military, with a foreign government, his power in respect to foreign affairs includes power to refuse to sanction the travel of American citizens in that area."

In sum, the travel ban justification accepted by this Court in *Worthy* was that American newsmen traveling in Communist China might be placed *in trouble or danger* there, creating serious international difficulties for our Government because of our limited ability to afford protection to citizens traveling in Communist China.

It is equally clear that this consideration of danger or trouble in Communist China is *inapplicable* to Congressman Porter who, if permitted to enter Communist China, would obviously be there under the solicitous protection of its government. On September 1, 1959, Mr. John W. Hanes, Jr., Security Officer of the Department of State, appeared to testify as the representative of the Department before a Special Subcommittee of the Committee on Government Operations of the United States Senate holding hearings upon pending passport legislation. In the course of that hearing, at which the appellant also appeared and testified, Mr. Hanes stated:

> "*I am using Mr. Porter as an example, since he has put himself forward as an example, if he traveled to Red China—incidentally, I am quite certain that the Communist Chinese would make very certain that nothing happened to him, because it would be to their propaganda advantage to see that nothing did . . .*" (R. 106).

Thus, unlike newsmen who might be abused or injured during their uninhibited wanderings in Communist China, the

record contains a significant concession by the Department of State that the Chinese Communist Government itself "would make very certain that nothing happened to" appellant; and yet, even in the absence of the primarily advanced justification for the denial of Communist China passports, Congressman Porter has nevertheless been denied such a passport.

Realizing the inapplicability to Congressman Porter of the "trouble or danger" argument, the Government will likely advance an alternative rationalization, suggested in a 1959 letter from the Assistant Secretary of State (J.A. 11) —that a Congressman's visit to Communist China might be misinterpreted there as some change of our foreign policy toward that country. But clearly this argument is so broad as to be self-defeating; absent some valid consideration relating to personal safety in a country where a passport affords protection to an American citizen, no competent authority has ever suggested that the Secretary's power to deny passports can properly be based on nothing more than possible misinferences drawn from travel by a Congressman to another country. If absent likelihood of danger or trouble, Members of Congress may be denied Communist China travel merely because of the general foreign policy implications of their presence there, the Secretary might just as well preclude Congressmen from visiting Cuba, the Dominican Republic, Egypt or France.[6] There is certainly no major governmental agency that does not on numerous occasions feel that what Members of Congress do and say in various places in and out of the country has some unfavorable consequences, but this has never before been thought to justify executive in-

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[6] See, e.g., the presence of Representative Powell at the Bandung Conference in 1955, which the Department at that time apparently viewed with considerable disfavor.

fringement upon the prerogatives of Members of Congress. The Secretary of State is no more justified, because of a supposed misunderstanding abroad of the significance of Communist China visits by Congressmen, to forbid such visits, than the Congress would be justified in restricting the travels abroad of the Secretary of State, which on occasion have been viewed with equal disfavor.

In these circumstances it is clear that the courts will intervene to preserve the constitutional separation of powers against executive impairment of a vital legislative function. A comprehensive analysis and application of this principle appears in the case of *Humphrey's Executor* v. *United States*, 295 U.S. 602, where the Supreme Court stated (at 629-30):

> "The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. James Wilson, one of the framers of the Constitution and a former justice of this court, said that the independence of each department required that its proceedings 'should be free from the remotest influence, direct or indirect, of either of the other two powers.' Andrews, The Works of James Wilson (1896) vol. 1, p. 367. And Mr. Justice Story in the first volume of his work on the Constitution (4th Ed.) § 530, citing No. 48 of the Federalist, said that neither

of the departments in reference to each other 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' "

In *Humphrey's Executor* the Court found the President's removal from office of one appointed to an independent agency to trench upon the prerogatives of the legislative branch.[7] While it is true that there the interference with the exercise of the prerogatives of a coordinate branch involved illegal removal of persons from office, the Executive is no more authorized by lesser means to prevent members of coordinate branches of the Government from performing their official functions. The principle in either event is the same—the Executive may not interfere with Members of Congress in the exercise of their office, for, as the Supreme Court stated in *Humphrey's Executor*, "neither of the departments in reference to each other 'ought to possess, directly or indirectly, an overruling influence in the administration of their respective powers.' " See also *Youngstown Sheet & Tube Co.* v. *Sawyer*, 343 U.S. 579.

We do not seek to delimit the considerations which might justify the Secretary's banning of travel by the Members of Congress in countries with whom we are not in a state of armed combat. But it is clear in any event that the Government has not yet suggested even a plausible theory which, absent the "danger or trouble" rationale which is inapplicable to appellant, could justify prohibiting visits by Members of Congress to Communist China. It is submitted that in this case there has been direct and unjustified executive impairment of a time-honored legislative prerogative of travel and inspection and that the Secretary

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[7] The result in *Humphrey's Executor* was most recently reaffirmed and reapplied in *Wiener* v. *United States*, 357 U.S. 349.

should be directed to remove an irrational and stultifying ban on official Communist China visits by members of the Congress of the United States.

II

There Is Urgent Need for This Court's En Banc Review of the Statutory Authorization Question Which Was Erroneously Resolved in Favor of Appellee in the Worthy Decision.

There is an additional ground for the granting of the relief requested by appellant arising from the fact that the Secretary's impairment of liberty of travel lacks the necessary statutory foundation for executive encroachment upon general liberties. While we are cognizant that a panel of this Court in *Worthy* has ruled to the contrary, we respectfully urge that the ruling to that effect is erroneous and requires this Court's en banc review, especially in light of developments subsequent to the *Worthy* decision.

This Court's *Worthy* decision postulated an inherent executive power over foreign travel sufficient to impose area limitations on the passports of American citizens.[8] But even if the President has such inherent power to impose limitations on liberty of travel, which we deny, the simple answer is that the President has not *exercised* any such power. As the Supreme Court recently said in *Greene* v. *McElroy*, 360 U.S. 474, 496:

> "the question which must be decided in this case is not whether the President has inherent power to act or whether Congress has granted him such a power;

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[8] *Cf.* p. 93 of the Government's Supreme Court brief in *Kent* v. *Dulles*, 357 U.S. 116, where, contrasting the executive power to exclude aliens with that over citizens, the Government stated "*we make no claim of such inherent executive power to restrict the travel of citizens . . .*" And see dissenting opinion of Judges Bazelon and Edgerton in *Briehl* v. *Dulles*, 248 F. 2d at 588-595.

rather, it is whether the President or Congress exercised such a power . . ."

This Court in *Worthy* relied upon Executive Order No. 7856 of 1938 and Proclamation No. 3004 of 1953 in finding Presidential delegation to the Secretary of State. Executive Order 7856, 3 F. R. 799 (1938), 22 CFR 51.75, authorized the Secretary of State "in his discretion . . . to restrict a passport for use only in certain countries." But at the time of the promulgation of this order in 1938 a passport was not a legal necessity for any travel. Thus this Presidential order of 1938 was a device to discourage travel, not a step in its prohibition. Proclamation No. 3004, *supra,* p. 6, similarly did not authorize the Secretary of State to make it unlawful for American citizens to enter particular foreign countries. Its title, "Control of Persons Leaving or Entering the United States", as well as its contents, establish it as an exercise of border control. It merely makes the "departure and entry" of citizens "from and into the United States" subject to the regulations of the Secretary in 22 CFR 53.1-53.9.

There is, therefore, no Presidential action which grants authority to the Secretary to prohibit entry into particular countries.[9] Nor is there any such statutory authoriza-

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[9] To make matters worse there is not even action by the Secretary of State approving the Communist China travel ban presently applied by the Department. Secretary Herter's sworn interrogatory answers reveal that he has not personally reviewed and promulgated the present policy of passport restriction (Interrogatory Answers 2(b) and 5, J.A. 19, 20). While appellant denies the existence of the power of passport restriction asserted by the Secretary, if the Secretary does indeed hold such power, the very least that is required in view of the constitutional rights here being impaired is that the policy be personally approved and promulgated, and seasonably and periodically reviewed, by the Secretary himself. So sweeping a proscription on freedom of travel cannot properly be committed to the power of some assistant or division head or to the decision of a former Secretary rendered many years ago in the light of considerations no longer appropriate or germane.

tion. In *Worthy* this Court pointed only to 8 U.S.C. § 1185b as the source of legislative authority for prohibiting the travel of American citizens to Communist China. This sole statutory authority advanced in support of the Secretary's action provides that while a proclamation of national emergency is in force

> "it shall, except as otherwise provided by the President, and subject to such limitations and exceptions as the President may authorize and prescribe, be unlawful for any citizen of the United States to depart from or enter, or attempt to depart from or enter, the the United States unless he bears a valid passport."

It is difficult to understand how this provision, which relates only to the legality of departure from the United States without a valid passport, can be thought to justify the issuance of passports with area limitations. Certainly a criminal statute which must be narrowly construed, and which merely precludes departure from the United States under certain circumstances, cannot reasonably be held to authorize regulations precluding entry into Communist China by one who has not departed from the United States in violation of the statute.

The legislative history of the statute and of its 1918 predecessor (40 Stat. 559) establishes its purpose as American border control. Its "chief object" was to obstruct "aliens and alien enemies and renegade citizens" who "can now enter and depart without any power . . . to intercept or delay them" (56 Cong. Rec. 6192). The Secretary's regulations construe this statute, as do we, as being limited to control over entry into and departure from the United States (22 CFR 53.1-53.8).

But if the face of the statute and its legislative history be not sufficiently persuasive, there is also the history sub-

sequent to this Court's *Worthy* decision. Thus, the Government which had urged on this Court the sufficiency of the statutory authorization or, in the alternative, the lack of any necessity for statutory authorization for the Secretary's area restrictions, has turned to the United States Congress for just such specific statutory authorization. In 1958 the President asked Congress for "clear statutory authority to prevent Americans from using passports to travel to areas where there is no means of protecting them, or where their presence would conflict with our foreign-policy objectives" (H. Rep. No. 2684, 85th Cong., 2d Sess., p. 3). Congress has thus far failed to comply with the Administration request for a passport denial and area restriction statute, although "the Executive has continued to press for action, citing 'the total lack of legislative authority to deny passports' " even to "dangerous participants in the international Communist conspiracy" (H. Rep. No. 1151, 86th Cong., 1st Sess., p. 2 (Sept. 4, 1959)).

Similarly, in opposing Supreme Court review in *Worthy* and *Frank,* the Government largely abandoned its statutory authorization claims in this Court, urging instead that there need not be "explicit action by Congress authorizing the particular limitations imposed by the Secretary of State" and that the authority for the Secretary's area limitation "comes primarily not by action of Congress, but from the Constitution itself . . ." (*Frank* Brief in Opposition, pp. 9-10).

We submit that 8 U.S.C. § 1185 cannot support the Secretary's action in the instant case any more than in *Kent* v. *Dulles,* 357 U.S. 116, 129, where the Supreme Court expressly held that "§ 1185 and § 211a do not delegate to the Secretary the kind of [passport restriction] authority exercised here". The Government's request

for Congressional authorization for the Communist China travel ban and similar travel restrictions, and its reversion before the Supreme Court to the "inherent power" argument, has given emphasis to the weakness of this Court's *Worthy* opinion on this important subject and the need for this Court's en banc review of the issue.

Conclusion

Something more than the inadequate and inapposite criminal provision relating to unlawful departure from the United States without a passport is required before an executive official may deny a Member of Congress the opportunity, in pursuit of his Congressional prerogatives and functions, to make a visit of inspection to another nation. Nor can it be that there is "inherent power" in the executive branch to make such unprecedented inroad upon what has hitherto been recognized as the freedom of Members of Congress to pursue their functions unhindered by executive interference. The impairment of vital Congressional prerogatives by the Secretary's action is so clearly unjustified by any proper countervailing consideration and is so corrosive of the freedom and independence of the members of a coordinate branch of the Federal Government as to require the remedial action of this Court.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be reversed.

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BRIEF FOR APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15394

CHARLES O. PORTER, APPELLANT

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

J. WALTER YEAGLEY,
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United States Court of Appeals
For the
District of Columbia Circuit

FILED FEB 19 1960

Joseph W. Stewart

CLERK

QUESTION PRESENTED

Whether the current policy of the Executive restricting travel of United States citizens in the portion of China under Communist control impairs "the legislative interests and prerogatives" of appellant, a Member of Congress, who without Congressional authorization desires to travel to Communist China.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 15399

CHARLES O. PORTER, APPELLANT

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal from an order entered on September 30, 1959, dismissing a suit for a declaratory judgment and injunctive relief (J.A. 27).

The appellant, a Member of Congress from the State of Oregon, holds a valid passport containing the following restriction (J.A. 1):

> This passport is not valid for travel to the following areas under control of authorities with which the United States does not have diplomatic relations: Albania, Bulgaria,[1] and those portions of China, Korea and Viet Nam under Communist control.

On June 10, 1959, the appellant wrote to the Secretary of State requesting, on behalf of himself and a number of persons who were to accompany him, permission to visit Commu-

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[1] Restrictions on travel to Bulgaria were removed May 12, 1959. Department of State Press Release No. 322.

nist China (J.A. 3, 10). In a subsequent sworn affidavit appellant stated (J.A. 14–15): "I deem it necessary in connection with that trip to the Orient, in order fully and knowledgeably to perform my legislative functions as a Member of Congress, to visit Red China to gain first hand information concerning conditions there, and also as to the character, purposes and designs, domestic and international, of the political leadership of that Nation, and the potentialities and circumstances of trade between Red China and the United States."

By letter of July 2, 1959, the Secretary replied in part as follows (J.A. 10–11):

> In 1952 the Department established the policy of not validating passports for Communist China. This policy is based on a number of considerations, among which are the fact that a state of unresolved conflict still exists between the United States and Communist China stemming from the latter's aggression against the United Nations in Korea and the fact that the Peiping regime continues to resort to force from time to time in the Taiwan Strait area. The emergency declared by President Truman in 1950 is still in effect.
>
> Another factor of importance is that in the absence of diplomatic relations with Communist China, it is not possible for the Government to provide the customary protection to Americans traveling on the China mainland. In addition, the Communist Chinese have consistently maltreated Americans and continue to hold American citizens in prison as political hostages despite their pledge of September 10, 1955 to release them expeditiously. Another and important factor is the effort of the Communist Chinese to utilize trade and cultural contacts to promote political objectives hostile to our interests.
>
> * * * * *
>
> In your case, I might add that as a Member of Congress your visit would be interpreted throughout Asia as well as by the Communist Chinese as a basic change in policy at the very time when the Communists are engaged in liquidating the Tibetan revolt, threatening

war in the Taiwan Straits and showing increasing arrogance and contempt for international law and decency.

Appellant's application was denied (J.A. 12).

Subsequently, the appellant was authorized to "travel to Okinawa and Japan during the recess of Congress, in official capacity for the Committee on Post Office and Civil Service, House of Representatives" (J.A. 25), to "take care of matters pertaining to civilian employee problems in that area" (J.A. 26). At no time did the appellant request or receive Congressional authority to travel to Communist China (J.A. 22–23 [questions 3 and 4]; J.A. 24 [answers 3 and 4]).

On August 27, 1959, the appellant filed a complaint in the United States District Court for the District of Columbia (J.A. 1–5), seeking, in essence, injunctive relief and also asking a judgment declaring that as a member of Congress he has a right to travel to Communist China in the interest of his legislative duties and that the appellee's refusal to issue him a passport valid for travel to Communist China is unlawful, and violates his constitutional rights as a citizen and a Congressman (J.A. 1–5). On September 14, 1959, the appellant filed a motion for a preliminary injunction (J.A. 14), followed the next day by a motion for summary judgment (J.A. 13). The appellee countered with a motion to dismiss, or, in the alternative, a cross-motion for summary judgment (J.A. 21). By order of September 30, 1959, the District Court denied the appellant's motions, granted the appellee's cross-motion for summary judgment, and dismissed the complaint (J.A. 27)

Appellant filed an appeal to this Court (J.A. 28), but then petitioned the Supreme Court for a writ of certiorari before judgment in this Court (*Porter* v. *Herter*, No. 488, October Term 1959) in an effort to have the merits of his case considered together with *Frank* v. *Herter*, — App. D.C. —, 269 F. 2d 245, and *Worthy* v. *Herter*, — App. D.C. —, 270 F. 2d 905, both of which were then pending on petitions for writs of certiorari to this Court. The question raised in appellant's petition was identical to the one raised on the present appeal (Petitioner's Brief in No. 488, *supra*, p. 2). The Supreme Court, by order of December 7, 1959, denied all three petitions. 361 U.S. 918.

STATUTES, EXECUTIVE ORDERS AND REGULATIONS INVOLVED

The pertinent provisions of statutes, Presidential Orders and Proclamations, and Regulations of the President and of the Secretary of State involved are set forth in Appellant's Brief at pp. 5–9.

SUMMARY OF ARGUMENT

I

Appellant's argument that as a consequence of the Congressional immunity a Member of Congress is entitled to go wherever he pleases at any time is not borne out by accepted practices and decisions. The immunity clause of the Constitution—Art. I, Sec. 6, Cl. 1—does not render a Member of Congress immune from observing the law of the country; it gives a broad immunity from libel suits. Since the intent of the clause was to prohibit action which might restrain or make the legislative process inoperative, it does not cover the instant case. We are not here concerned with free debate, but with action—action consisting of traveling to a world trouble spot and communicating with the leaders of a regime which the United States does not recognize. In our view, the Executive may—as part of his duty to establish and implement foreign policy—refuse to validate a passport of a Congressman for travel to an "off limits" area, where Congress has not authorized such trip. Under such circumstances the Congressman is but another citizen, bound by the Executive policy determination, and this case is fully governed by the principle of the *Worthy* and *Frank* cases, *infra*, pp. 5–6.

II

There is no merit in appellant's claim that the Executive's policy interferes with the pursuit of his "legislative functions" (he alleges that his proposed investigation of United States relations with Communist China constitutes such function). It is well established that the investigatory powers of Congress can be exercised only pursuant to a valid authorization. No resolution, however, exists which purports to authorize appellant to investigate United States relations with Communist China. Appellant was authorized by the Chairman of the House Committee on Post Office and Civil Service to

make a trip to Japan and Okinawa to look into matters pertaining to civilian employee problems in that area—not to investigate matters pertaining to Communist China. Absent a valid Congressional authorization, appellant's proposed travel to Communist China is a private journey. It has never been suggested that a Congressman traveling for his own pleasure is performing a "legislative function".

In view of the lack of authorization for the travel, the separation-of-powers doctrine is not properly raised by the appellant. Furthermore, the doctrine runs in favor of the Executive in this case, since it is he alone who has "the power to speak or to listen as a representative of the nation" in matters of foreign affairs. *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320. Appellant is also mistaken in suggesting that misinferences which might be drawn from his travel abroad are not a valid concern of the Government. Cf. *Perez* v. *Brownell*, 356 U.S. 44. In view of his status as a Congressman his travel to Communist China—if sanctioned by the Executive—would undoubtedly be interpreted throughout the world, and particularly in Asia, as importing a change of the foreign policy of the United States.

In any event, in view of the absence of proper Congressional authorization, no questions of constitutional law need be reached in this case due to the salutary principles that the judiciary will not anticipate constitutional questions and will dispose of cases on other than constitutional grounds if such other grounds are present.

ARGUMENT

Appellant rests his case on the contention that the principle of *Worthy* v. *Herter*, — App. D.C. —, 270 F. 2d 905, and *Frank* v. *Herter*, — App. D.C. —, 269 F. 2d 245, is inapplicable here (Br. 13–26), or alternately, that the principle itself should be re-examined (Br. 26–30) so as to permit his proposed travel to Communist China.

The reasoning underlying appellant's first thesis is that all acts performed by Members of Congress during the tenure of their office carry a gloss of "Congressional business," in consequence of which Members of Congress possess a wide range of immunity from acts by others and from restraint by other

branches of the Government. In support, he refers to the historic practice of holding assailants in contempt for attacking Congressmen (Br. 16–18). Though we have no quarrel with appellant's discourse upon Congressional contempt powers in cases of criminal assaults upon its members, it has no relevance to the crucial question here: whether the Executive may—as part of his duty to establish and implement foreign policy—refuse to validate a passport of a Congressman for travel to an area of a foreign country which has been placed "off limits" to United States citizens, and where, as here, the Congress has not authorized the trip to the restricted area.

We need not reiterate at the present the arguments made in the *Worthy* and *Frank* cases, *supra*, that the Executive's authority in the field of foreign relations encompasses authority to fix the limits where American citizens should travel in foreign countries, if such travel would interfere with a fundamental interest of the nation as a whole. Two separate panels of this Court have found that such authority exists, and the Supreme Court has declined to review this determination. Appellant's attempt to seek a reconsideration of this question in the latter part of his argument (Br. 26–30) is as unpersuasive as were the original contentions of the appellants in the *Worthy* and *Frank* cases, *supra*.

The sole question therefore is whether, in the context of this case, appellant may claim rights in addition to those which every citizen of the United States possesses.

I. Appellant can claim no constitutional protection for the "rights" which he seeks.

A. As indicated earlier, we do not believe that Congressional contempt practice can support the broad claim of privilege or immunity here made. Nor is appellant's case advanced by reference to the "traditional practice of both houses relating to the franking privilege, office expenditures, disbursements for letters, telegrams, telephone and the like" (Br. 15). No one would deny that a Congressman mailing a letter to a constituent is performing a function of his office or that a member of the House is acting as a member while in his office as well as in committee or on the floor. No contention is made that

appellant, if he got to Communist China, would not there still be *Congressman* Porter. That fact, as we see it, is a reason why he should not be exempted from respecting the foreign policy determinations made by the Executive.

As far as our research has gone—and we have not limited it to the precedents cited by the appellant—there is no principle of constitutional (or statutory) law to support his claim that simply because he is a Member of Congress, he is entitled to go wherever he pleases at any time.

B. The Constitution, Article I, Section 6, Clause 1, provides that—

> The Senators and Representatives * * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their Attendance at the Session of their respective Houses, and in going to and returning from the same; and for any Speech or Debate in either House, they shall not be questioned in any other Place.

The first clause has been interpreted narrowly and construed to apply to arrests in civil suits only—a practice still common at the time of the adoption of the Constitution. *Long* v. *Ansell*, 293 U.S. 76. It does not apply to service of process in civil cases, *id.*, nor does it privilege a Member of Congress from arrests and prosecutions for any criminal offenses. *Williamson* v. *United States*, 207 U.S. 425, 446.

The latter clause, however, has been held to give a broad scope to the immunity of legislators. *Kilbourn* v. *Thompson*, 103 U.S. 168. Appellant suggests that the broad immunity from libel suits furnishes a valid analogy to his claim here (Br. 17). It is manifest, however, that we are not in the area of *free debate* but in the area of an individual's *action*—action consisting of traveling to a world trouble spot and communicating with the leaders of a regime which the United States does not recognize. Cf. the prohibitions of 18 U.S.C. 953 (the Logan Act).

In this sphere, one distinguished authority on constitutional law has summarized the present doctrine as follows:

> The President today is not only the organ of communications of the United States with foreign govern-

> ments—he is the *only* [*sic*] organ thereof; as such he is entitled to shape the foreign policies of the United States so far as he is actually able to do so within the conditions imposed by the acts of Congress; and more often than not Congress chooses to follow the leadership that his conspicuous advantages of position serve to confer on him [CORWIN, THE PRESIDENT; OFFICE AND POWERS 1787–1957 (1957), pp. 226–7].[2]

Reference to the precedents interpreting the immunity clause serves to destroy appellant's claim of Constitutional protection. Obviously the intent of this clause was to prohibit action which might restrain or make the legislative process inoperative; it was not intended, according to accepted practices and decisions, to give Representatives to the Congress of the United States the unlimited freedom of action appellant claims.

II. There is no showing of a committee authorization for appellant's travel to Communist China, and hence no valid legislative purpose.

A. It remains to examine the claim advanced by appellant that the Executive's policy interferes with the pursuit of his "legislative functions" (Br., "Question Presented"). The import of appellant's argument is that since the investigatory powers of Congress are a vital part of the legislative process (Br. 14, fn. 3), each legislator necessarily possesses such powers and can exercise them at will. The argument rests on a *non sequitur*, and the Congressional practice runs manifestly counter to appellant's conclusion.

Congress, unless it should choose to investigate as a body, exercises its investigatory powers only through committees. *Quinn* v. *United States*, 349 U.S. 155, 160. See also *United States* v. *Lamont*, 18 F.R.D. 27, 32 ("No committee of either

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[2] In this context we call the Court's attention to the overwhelming support of the House of Representatives of the Executive's policy respecting Communist China. See H. Con. Res. 369, 86th Cong., 1st Sess., expressing the sense of the Congress against accepting the Communist Regime in China as the representative of China by a vote of 368 to 2 (105 Cong. Rec. [daily ed.] 14727, 14736). See also note following 22 U.S.C. (1958 ed.) § 287, entitled "UN Membership for Communist China".

the House or Senate, and no Senator and no Representative, is free on its or his own to conduct investigations unless authorized"). In this respect, the standing committees of the Senate are granted somewhat broader powers than the standing committees of the House. See *Congressional Power of Investigation*, S. Doc. No. 99, 83d Cong., 2d Sess. (1954). In summing up the investigatory powers of the House of Representatives, Senate Document No. 99, *supra* concludes (p. 8):

> On the House side, the Legislative Reorganization Act of 1946 (60 Stat. 812) granted general investigatory powers only to the Committee on Un-American Activities. Therefore, authority of other committees must be sought in specific resolutions passed by the House for that purpose.

Nowhere does appellant's brief cite or refer to a House Resolution purporting to authorize an investigation into the "character, purposes and designs, domestic and international, of the political leadership of [Communist China], and the potentialities and circumstances of trade between Red China and the United States" (Br. 19–20).

The following interrogatory was propounded to the appellant in the court below (J.A. 22):

> 1. Your affidavit in support of your Motion for Preliminary Injunction indicates that your proposed trip to the Orient is in connection with your "Congressional Committee assignment." Please set forth the designation of the Committee and your position in connection with such Committee.

Appellant replied (J.A. 24):

> 1. Post Office and Civil Service Committee; ranking Democratic member of Civil Service Sub-Committee. My trip to the Orient is *to investigate personnel problems of overseas employees.* [Emphasis added.]

Surely appellant's authorized purpose, evidenced by his sworn answer to the interrogatory—and see also J.A. 25–26—does not bear even an attenuated resemblance to the purpose which he alleged in his complaint, and which he reiterates in this

Court. The Committee on Post Office and Civil Service, of which appellant is a member, has jurisdiction "over all civilian employee matters, including those of the Department of Defense" (J.A. 25). In authorizing appellant's travel to Japan and Okinawa, the Chairman of that committee asked appellant "to take care of matters pertaining to civilian employee problems in *that* area" (J.A. 26; emphasis added)—a far cry from the authority for the travel, and the purposes of the travel, which is claimed here.[3]

A resolution authorizing a congressional investigation will be presumed to be based upon a valid legislative purpose (see Senate Document No. 99, *supra*, p. 3); a necessary corollary of that rule is that in the absence of such authorization there is no such presumption; and the record of this case discloses a complete lack of any kind of Congressional authorization.

Appellant also suggests (Br. 20, fn. 5) that the affidavit in which he alleged that his proposed travel was in fact in furtherance of his legislative function should be taken on its face as establishing that fact. The very case upon which he relies (*Howard* v. *Lyons*, 360 U.S. 593), however, refutes any such notion. "[O]f course such an averment * * * cannot foreclose the courts from examination of the question". *Id.*,

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[3] We, of course, do not suggest that Congress may not, in an area where it may validly legislate, gather information abroad in pursuance of its function. Thus, in 1956, when the Committee on Ways and Means was conducting hearings with respect to the United States tariff policy, its Subcommittee on Customs, Tariffs, and Reciprocal Trade Agreements conducted an on-the-spot study in Europe and Japan of the effects of our trade laws and policies on foreign countries. See *Report to the Committee on Ways and Means on United States Custom, Tariff, and Trade Agreement Laws and their Administration* (1957), pp. 2–3. What is of direct relevance to the present case, however, is that the Committee was acting pursuant to specific authority contained in H. Res. 331, 84th Cong., which, as subsequently modified by H. Res. 606, read in part:

"*Resolved*, that the Committee on Ways and Means, acting as a whole or by subcommittee, is authorized and directed to conduct thorough studies and investigations of all matters coming within the jurisdiction of such committee.

Sec. 2. For the purpose of this resolution, the committee, or any subcommittee thereof, is authorized to hold such hearings, to sit and act during the present Congress at such times and places, within or without the continental United States, its Territories, and possessions, as the committee may determine * * *." [101 Cong. Rec. 12433; 102 Cong. Rec. 14044].

at 597. In addition, the *Howard* case speaks of *uncontroverted* affidavits, a fact not here present.

B. In an effort to create a constitutional issue, appellant finally suggests (Br. 24–25) that this Court should review the determination below "to preserve the constitutional separation of powers against executive impairment of a vital legislative function". As we have just shown, there is a total absence of a "vital legislative function", and no question of separation-of-powers is properly raised. If any such issue be deemed to be in the background, it would be the Executive arm of the Government in whose favor the separation-of-powers doctrine runs in this case. The Supreme Court has repeatedly acknowledged this fact. See, *e.g., United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 ("In this vast external realm, with its important, complicated, delicate and manifold problems, the President alone has the power *to speak* or *to listen* as a representative of the nation. * * * Into the field of negotiation the Senate cannot intrude, and Congress itself is powerless to invade it." Emphasis supplied). *United States* v. *Pink*, 315 U.S. 203, 242 ("In our dealings with the outside world, the United States speaks with one voice and acts as one, unembarrassed by the complications as to domestic issues * * *." Mr. Justice Frankfurter concurring).

Appellant correctly anticipates (Br. 23) our position that in view of his status as a Congressman his travel to Communist China undoubtedly would be interpreted throughout the world, and particularly in Asia, as importing a change in the foreign policy of the United States. Appellant shrugs off this argument by characterizing it as "broad" and "self-defeating" (Br. 23), and suggests that "possible misinferences" which may be drawn abroad are not a valid concern of the Government.

Recent pronouncements of the Supreme Court point, in our view, in the other direction. In *Perez* v. *Brownell*, 356 U.S. 44, 59, the opinion of the Court reads:

> * * * Experience amply attests that, in this day of extensive international travel, rapid communication and widespread use of propaganda, the activities of the citizens of one nation when in another country can easily

> cause serious embarrassments to the government of their own country as well as to their fellow citizens. * * * The citizen may by his action unwittingly promote or encourage a course of conduct contrary to the interests of his own government; moreover, *the people or government of the foreign country may regard his action to be the action of his government, or at least as a reflection if not an expression of its policy.* [Emphasis supplied.][4]

In that case, the inference which might be drawn abroad from Perez' conduct furnished the rational nexus between such conduct and his loss of citizenship. We submit that the same consideration applies with equal and perhaps *a fortiori* force in the context of this case. Appellant's *in terrorem* argument that "the Secretary might just as well preclude Congressmen from visiting Cuba, the Dominican Republic, Egypt or France" (Br. 23) cannot distort the issue in this case. Cf. *Worthy* v. *Herter*, 270 F. 2d 905, 912–913. The differences in our relations with those countries vis-à-vis our relations with Communist China are so patent as not to require argument on our part.

A more fundamental reason why no separation-of-powers issue need be reached in this case is furnished by the salutary principles of constitutional law that courts will not anticipate constitutional questions in advance of the necessity of deciding them, and will not pass upon such questions if there is also present some other ground upon which the case may be disposed of. *Ashwander* v. *T.V.A.*, 297 U.S. 288, 346–347 (Mr. Justice Brandeis concurring).

The court below properly held that appellant is but "an ordinary citizen, who happens to be a Congressman, not traveling on official congressional business" (J.A. 26), and that the case is fully governed by this Court's determinations in the *Worthy* and *Frank* cases, *supra*.

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[4] The *Perez* case decided that withdrawal of the citizenship of Americans who vote in foreign elections is reasonably calculated to effect the avoidance of embarrassment in the conduct of foreign relations.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

United States Court of Appeals
For the
District of Columbia Circuit
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No. 15,394

CHARLES O. PORTER,
Appellant,

v.

CHRISTIAN A. HERTER, SECRETARY OF STATE,
Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PETITION FOR REHEARING EN BANC

This is an action by Charles O. Porter, a Member of Congress representing the Fourth District of Oregon, challenging the authority of the Department of State to deny him the opportunity to make a visit of inspection to Red China in connection with his Congressional duties. On April 14, 1960, a panel of this Court consisting of Mr. Justice Burton, retired, and Circuit Judges Danaher and Bastian, affirmed the District Court's action in granting summary judgment for appellee Herter. The decision of the panel was based on the ground that the principles announced by panels of this Court in *Worthy* v. *Herter*,

— U.S. App. D.C. —, 270 F. 2d 905, and *Frank* v. *Herter*, — U.S. App. D.C. —, 269 F. 2d 245, are "controlling here."

We respectfully submit that the Court was in error in deeming the *Worthy* and *Frank* decisions to control the result in the instant case. As demonstrated in the Brief for Appellant (pp. 20-26), a copy of which is attached hereto, this Court's validation of the passport restrictions in those cases was based upon the possibility of "trouble" or "danger" which might arise from the "wanderings of uninhibited American newsmen in China" (270 F. 2d at 913). By contrast, this case involves the right of a Member of Congress to visit Red China for the more knowledgeable performance of his Congressional duties where the State Department has conceded that the Communist Chinese Government itself "would make very certain that nothing happened to him." Under these circumstances, the authority of the Department of State to restrict travel abroad by a Member of Congress in pursuit of his Congressional functions, is an important question of first instance calling for reconsideration by the full Court.

Moreover, even if *Worthy* were deemed to control the outcome in the instant case, there are compelling reasons for the full Court's reconsideration of the *Worthy* holding that there is adequate statutory authorization for the Secretary's area restrictions upon the use of passports. Since the *Worthy* decision, the Government itself has largely abandoned its claim of statutory authorization for the challenged restrictions, urging instead that the Secretary's area limitation authority "comes primarily not by action of Congress, but from the Constitution itself . . ." See Brief for Appellant, pp. 26-30. If, as the Government now appears to concede, the *Worthy* decision's finding of statutory authorization was erroneous, there is then pre-

sented by the instant case a vital and unresolved separation of powers issue concerning the "inherent authority" of the Executive department to impair the exercise by Members of the Congress of their constitutional prerogatives.

For the foregoing reasons it is respectfully submitted that a rehearing should be ordered en banc.

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Certificate of Good Faith

It is hereby certified that this Petition for Rehearing is presented in good faith and not for delay.

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(119-8)